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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 563

IRMA HOGAN,

Petitioner,

vs.

LEE J. RICKETTS, Executor of the Estate of Elizabeth Henschen, Deceased

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

George S. Hawke,
Counsel for Petitioner.

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No. 563

IRMA HOGAN,

Petitioner,

vs.

LEE J. RICKETTS, EXECUTOR OF THE ESTATE OF ELIZABETH HENSCHEN, DECEASED,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on October 9, 1953.

No Opinions Below

The District Court entered a judgment without any findings of fact, conclusions of law, or any opinion or memorandum.

No opinion was rendered by the Circuit Court of Appeals, but the entry affirming the lower court held "that the case was properly submitted to the jury under the applicable

Ohio law, *The Cleveland Trust Company, et al.* v. *Scobie,* 114 O. S. 241."

Jurisdiction

The final judgment of the Circuit Court of Appeals was entered on November 4, 1953. The Jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

Questions Presented

Did the Court of Appeals err in its finding that this case had been properly submitted to the jury in the District Court under the applicable Ohio law?

Did the Court of Appeals err in its failure to follow the latest decisions of the highest court of the State of Ohio involving the ownership of Joint and Survivorship Building Association Accounts, as required by the Rules of Decision Act 28 U. S. C. Sec. 1652 and of *Erie Railroad* v. *Tompkins,* 304 U. S. 64?

Statute Involved

The pertinent statutory provisions which were in existence when *Cleveland Trust Co.* v. *Scobie,* 114 O. S. 241 was decided in 1926, and which are now in existence are as follows:

Title of Chapter, "Building and Loan Association Powers,"

> Sec. 9648 Receiving of Deposits; Joint Accounts, General Code, (now Revised Code Sec. 1151.19) "When such deposits * * * are made to the joint account of two or more persons * * * with a joint order to the corporation that such deposits * * * are to be payable on the order of any one or more of such joint depositors, and to continue to be so payable notwithstanding the death or incapacity of one or more * * * Such Accounts Shall Be Payable to Any One or More of Such

Survivors * * * Notwithstanding Such Death or Incapacity."

The foregoing Section was enacted in 1908, 99 Ohio Laws p. 528, Section 6. Moreover, a similar statutory provision applying to Banks and Trust Companies now exists, namely O. Gen. Code Sec. 710-120, (now Sec. 1105.09 Rev. Code) enacted in 1919, 108 Ohio Laws, Part One, Sec. 120, page 111, which section was a re-enactment in 1910 of former Sec. 9790-1, shown in 101 Ohio Laws, Sec. 1.

Said statutes were relied upon in 1926 in *Cleveland Trust* v. *Scobie*, as shown in the brief in that case, page 14, Ohio Supreme Court Case No. 19,332.

Statement

On the Federal ground of diversity of citizenship in a claim of over $3,000 the Indiana Executor filed his District Court action against the donee niece Mrs. Hogan on four separate Joint and Survivorship Building Association Accounts of the donor aunt Mrs. Henschen, opened by her in October 1949. Mrs. Henschen died in January 1950. Said Federal suit did not include a first Joint and Survivorship account opened and maintained from 1942, as it did in the first suit filed by the Indiana Executor in the Common Pleas Court of Hamilton County, Ohio. Said first State Court suit was dismissed without prejudice by plaintiff, in order to enable him to bring this present action in the District Court at Cincinnati.

This present case was submitted to a jury by the District Court on four causes of action for its Special Verdict as an advisory jury, for its sole answer to one interrogatory prepared by plaintiff, which applied alike to each of the four causes of action, said Interrogatory reading:

"Interrogatory. Do you find by the preponderance of the evidence that on October 4, 1949 when Elizabeth

> Henschen and Irma Hogan signed the signature card of the (Cincinnati Federal Savings & Loan Association of Cincinnati) covering (Account No. 4897) Elizabeth Henschen at said time Had the Intent to Transfer to Irma Hogan a Present Joint Interest in the Account Equal to Her Own, including the right of survivorship?''

Said language was represented by the plaintiff to the court to be based upon 114 O. S. 241 decided in 1926. Defendant contended that the submission of such Interrogatory was erroneous.

The Advisory Jury answered "No," and such answer wholly determined the result against the defendant and a judgment in favor of the plaintiff. Same was brought to the attention of the trial judge of the District Court by defendant's motions for a directed verdict for the defendant, and for a judgment for the defendant non obstante veredicto, motion for a new trial, etc.

Judge Allen when a member of the Supreme Court of Ohio wrote the *Scobie* opinion in 1926. She left that bench on April 8, 1934, and naturally would not have occasion to be conversant with the modifications of that case since that time by the rest of the Court. The decision in the case of *Cleveland Trust* v. *Scobie* has been modified since 1926, notably on May 8th 1935 in

Oleff Admr. v. *Hodapp Gdn.*, 129 O. S. 432;

On April 14, 1937 in *Sage, Executor* v. *Flunk,* 132 O. S. 377;

On May 21, 1941 in *Rhorbacker* v. *Citizens Bldg. Assn.*, 138 O. S. 273;

On July 19, 1950, *In re Estate of Hatch,* 154 O. S. 149.

The 1926 opinion in the *Scobie* case stated, p. 253, "He has created in the second party by contract a joint interest in his right to the deposit *equal to his own.*" The last four

words have been eliminated in the above cited cases, and the *Scobie* case thereby modified.

The use of such words in the Interrogatory which the jury was required to answer, resulted in the judgment against this petitioner.

Oleff, Admr. v. *Hodapp, Gdn.*, 129 O. S. 432 (Year 1935).

The importance of the definition as to Survivorship was so compelling, that even when a nephew Donee as Survivor murdered his uncle Donor to obtain the money in the account, the Ohio Supreme Court ruled that as Survivor, the Donee was entitled to the Joint and Survivorship deposit. And that the Joint and Survivorship Contract had given the Survivor Donee a vested interest in the money which could not be taken away by the courts.

> p. 437 "This Court inferentially construed this section in the case of the Cleveland Trust Co. *vs.* Scobie, Admr. 114 O. S. 241; but counsel for plaintiffs in error claim that the record in this case does not meet the requirements in that case, as it is necessary to show that the depositor intended to transfer to the person to whom he made the account jointly payable a present, joint interest therein, Equal to His Own."
>
> p. 438 "There is a written contract in this case and it is presumed to state the intent of the parties thereto, so long as it is clear and unambiguous. We fail to find any ambiguity therein. The Contract is clear, its words are plain, and it will not admit of parol testimony to vary its terms."
>
> *Sage, Executor* v. *Fluck*, 132 O. S. 377 (year 1937).

The decedent had opened an account in the Society for Savings with over $51,000 of her own money and caused the names of her sister and brother to be added to the account, with a joint and survivorship stamp on the signature card and on the pass book. The decedent had retained possession of the pass book throughout her lifetime.

The Ohio Supreme Court held, page —

> "The dominant question is whether a joint and survivorship deposit account belongs to the estate of its creator or to the surviving joint depositors. In Ohio, a surviving joint depositor has a right to the proceeds of a joint and survivorship bank account, not as an incident of joint tenancy, * * * but arising out of the Contract of deposit."
>
> *Rhorbacker* v. *Citizens Bldg. Assn.*, 138 O. S. 273 (1941).

The decedent in her life-time instructed the Building Association to write a certificate of deposit for $1800 in her name and that of a friend, payable to either or survivor, and to place same in her pass book which she had left there for safe keeping. The survivor did not know of the transaction until after the death of the original owner. The syllabus states that the transaction gave rise to an Executed Contract by which the designated person became entitled to "An immediate joint and equal interest," in the certificate.

In Re Estate of Hatch, 154 O. S. 149 (Year 1950).

As to the use of the words "Equal to her own," we quote from page 152 in said most recent case:

> "Obviously, the creation of a joint and survivorship bank account is a matter of intention to be ascertained from the conduct and actions of the persons concerned. Beginning with the case of Cleveland Trust Co. *vs.* Scobie, Admr. 114 O. S. 241, this court has adopted the view that persons may *contract* for the joint ownership of a bank account with the right of survivorship, and when such a contract has been entered into, the joint owner who survives succeeds to the title to the whole of the proceeds of the account by virtue of the contract."

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

(1) In failing to realize and to hold that the decision of the Ohio Supreme Court in 1926 in the *Scobie* case was modified by later decisions, and that now the later judicial decisions of such Supreme Court are the laws of Ohio, as provided in the Rules of Decisions Act, 28 U. S. C. Sec. 1652 and in *Erie Railroad* v. *Tompkins*.

(2) In failing to hold that the sundry cited later cases discussed in Petitioner's briefs, and in the Petition and Amended Petition for Rehearing, wherein it could not now be necessary to prove that the "intent" of the deceased donor must be to transfer to the donee a present joint interest "Equal to Her Own" in the Joint and Survivorship accounts.

(3) In affirming the order of the District Court.

Reasons for Granting the Writ

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

The effect of the Ohio Supreme Court decision in *Cleveland Trust* v. *Scobie* in 1926, that Joint and Survivorship accounts constitute a contract between the bank and its depositor, has been truly remarkable. Up until the date of such case the statutes permitted such accounts, but were entirely ignored. This wholly new concept by financial institutions and their depositors has resulted in a real and outstanding revolutionary change in the status and handling of such accounts, throughout the State of Ohio. It would be folly to even try to estimate the very many thousands of such accounts now in Ohio and in the States which have similar laws.

An official of one of the largest Savings Banks in Cincinnati, informs us that probably 90% of the new accounts now are Joint and Survivorship accounts. The practice is now so universal between the Banks and Building Associations on the one hand and their depositors on the other, that even most of the printed signature cards now presented to new depositors, provide for Joint and Survivorship accounts. This contract arrangement is now popular to such a large extent as to eliminate any necessity for probate proceedings to transfer the donor's account to the donee.

This matter was further impressed upon us in this case upon the voir dire examination of the nine men and three women first selected as jurors in this case. When such first jury failed to agree and was discharged, a new jury of nine women and three men was secured. Various members of the two panels of such jurors were conversant with Joint and Survivorship Accounts, and were parties to maintaining such.

The Ohio contract theory is still in full force and effect, but *Cleveland Trust* v. *Scobie* has been modified by the Ohio Supreme Court in the important particular exhibited in the instant case.

The Interrogatory upon which this case hinged, and which the defendant claimed was erroneous, was based upon the 1926 opinion in the *Scobie* case, and not upon the modifications of that decision since 1926, as it should have been.

No findings of fact or conclusions of law, or any opinion or memorandum was made by the District Court as required by the Rules, and consequently the Court of Appeals did not have the usual benefit or accurate knowledge of the lower court's reasons.

We know of no case in this Supreme Court where it has ever construed or defined the legal regulations or status of the big business involved in Joint and Survivorship Accounts, and for the reasons for their phenomenal rapid

growth and popularity, not only in Ohio, but in the other states.

Attention is called to the fact that this Petition presents questions of immediate and great importance far beyond the particular facts and the parties involved here, and that this really is a class action.

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a local court as to call for an exercise of this Court's power of supervision.

That elements of great public interest are at stake, and that this case presents a legal controversy within properly the jurisdiction of our Federal Courts and of this Court.

We respectfully submit that Certiorari could properly be granted because this Court believes that despite the primary factual nature of the case, the underlying problem is of great public importance and that the issue has been determined erroneously in the two lower Courts. Thousands of depositors and huge sums of money are involved in Joint and Survivorship Accounts.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GEORGE S. HAWKE,
Counsel for Petitioner,
1413 First Nat. Bank Bldg.,
Cincinnati 2, Ohio.

February 1, 1954.

APR 19 195
HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

No. 563

October Term, 1953

IRMA HOGAN,

Petitioner,

vs.

LEE J. RICKETTS, Executor of the Estate of ELIZABETH HENSCHEN, Deceased,

---

PETITION FOR REHEARING AND BRIEF IN SUPPORT

To the United States Supreme Court and the Justices;

The Petitioner in the above-entitled cause presents this Petition for a Rehearing of her Petition for a Writ of Certiorari, and, in support thereof respectfully shows:

That other substantial Federal grounds for Certiorari were available to this Petitioner although not previously presented, namely, that the Petitioner has been denied by the Court of Appeals the "due process of law" in the Federal Courts, guaranteed to her by the Fifth Amendment to the Constitution of the United States. That said Amendments constitutes a restriction upon the powers of the Federal Government, and same provides, "nor shall any person be deprived of life, liberty OR PROPERTY, without the due process of law."

That such Federal constitutional protection and guaranty of "due process of law" required a fair and full hearing and a consideration by the Court of Appeals, and a judgment in exact conformity and obedience to the law of the land, which right was not accorded to this Petitioner, but denied. And this even after it had been clearly and definitely shown in the Petition and Amended Petition for a

Rehearing in this case in the Court of Appeals, by unimpeachable later Ohio Supreme Court decisions, that the 1926 case of *Cleveland Trust Co.* v. *Scobie* (114 O.S. 241) had been reconsidered and modified by the said court after Judge Allen had left that bench, by its new decisions in 1935, 1937, 1941 and 1950, eliminating thereby the use of the four words which were fatal in the instant case, namely, "he has created in the second party by contract a joint interest in his right to the deposit 'EQUAL TO HIS OWN.'"

That under the Statutory laws of Ohio and the last decisions of the Supreme Court, the Petitioner on the death of her donor aunt, had an absolute right, title and interest as the Survivor named in the Joint and Survivorship Building Association Accounts, to the PROPERTY and funds in said accounts, according to the "Contract" between the donor and the Building Associations. We claim that said rights became vested on the death of the donor.

That in the instant case it is the substantive right, as declared by the laws of Ohio, which is to be enforced in the Federal Court under the "Rules of Decision Act."

That the parties and the Federal Courts must now search for and apply the entire body of such substantive law governing an identical action in the State Courts.

That it is the rule announced by "the highest Court of the State," to-wit, the Supreme Court of Ohio, which must be followed by the Federal Courts, as fully set forth in *Erie Railroad Company* v. *Tompkins* (year 1938) 304 U.S. 64. The term "laws" are now extended to include the principles of decisions of State Courts.

LINCOLN MINES OPERATING CO. VS. HURON, 27 FED. SUP. 720

> "The federal court is required to apply the law of the State whether the law has been declared by the State Legislature, or by the State's highest court in a decision."

THIS COURT FURTHER HAS JURISDICTION ON GROUNDS OF DIVERSITY OF CITIZENSHIP

A reading of *Erie Railroad* v. *Tompkins* would indicate that the sole ground of jurisdiction of diverse citizenship would be sufficient to raise the substantial Federal Question in this case. In this particular class of cases, the Federal Court should apply the law of the State of Ohio which governs the law of said state regarding joint and survivorship Building Association Accounts.

From the foregoing it is obvious that where the substantive right sued upon is derived from the law of the State, it is the law of the State which must be investigated to maintain the suit in a Federal Court, and that the Federal Court must follow the state law on the subject.

SUPREME COURT PRACTICE BY STERN AND GRESSMAN

"DIRECT CONFLICT OF DECISIONS BETWEEN A COURT OF APPEALS AND A HIGHEST STATE COURT ON FEDERAL QUESTIONS.

"Another valid reason for the granting of certiorari by the Supreme Court is the presence of a direct conflict between the decision of a court of appeals and that of the highest court of a state, where that conflict concerns federal questions. Such a conflict will warrant review of either of the conflicting decisions, since the Supreme Court is the final arbiter of matters of federal law decided by either federal or state courts. Hence a conflict between such courts concerning the construction and application of the federal Constitution, or the validity, construction or application of federal statutes or treaties, or any right, title, privilege or immunity thereunder, will support a petition for a writ of certiorari."

It should be apparent that there is here presented A CONFLICT BETWEEN THE SIXTH COURT OF APPEALS AND THE SUPREME COURT OF OHIO, WHICH HIGHEST COURT OF THE STATE HAS

ANNOUNCED THE PRESENT LAW OF OHIO APPLICABLE TO JOINT AND SURVIVORSHIP ACCOUNTS.

The very purpose of the Rules of Decision Act and *Erie Railroad* v. *Tompkins* has been wholly frustrated and ignored by the judgment of the Court of Appeals, which not only failed but refused to recognize that there is a conflict between it and the Ohio Supreme Court on the same subject.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this Petition for a Rehearing be granted and that the judgment of the Court of Appeals for the Sixth Circuit be upon further consideration reversed.

Respectfully submitted,

GEORGE S. HAWKE,
Counsel for Petitioner.

Dated April 15, 1954

Certificate of Counsel. I, George S. Hawke, counsel for the above named Petitioner do hereby certify that the foregoing Petition for a Rehearing of this cause is presented in good faith and not for delay, and that this petition is restricted to the grounds specified.

GEORGE S. HAWKE,
Counsel for Petitioner.